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No. 06-114

IN THE

SUPREME COURT OF THE UNITED STATES

AARON LEE JONES,

Petitioner,

v.

DONAL CAMPBELL, ET AL,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION

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CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

1. Should this Court grant certiorari to review the Eleventh Circuit's fact-bound decision that Jones's ineffective assistance of counsel claim is without merit?

2. Should this Court grant certiorari to review Jones's fact-bound claim that counsel failed to investigate and present mitigating evidence?

PARTIES TO THE PROCEEDING

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STATEMENT OF JURISDICTION

The statement of jurisdiction contained in Jones's petition for writ of certiorari is correct. Jones, however, has not articulated any basis for this Court to invoke its jurisdiction under Supreme Court Rule 10.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED

The statement of constitutional provisions and statutes involved in this case, which is contained on page 2 of the certiorari petition, is correct.

STATEMENT OF THE CASE

A. State Court Proceedings

On July 28, 1979, Aaron Jones was convicted of the capital offense of murder of two or more persons (Carl and Willene Nelson) by one or a series of actions in violation of Ala. Code §13-11-2(a)(10) (1975). The penalty phase, conducted the same day, resulted in the jury recommending a death sentence. (R1-14-Tab#1, CR. 138) Judge Carl NeSmith sentenced Jones to death on August 17, 1979. (R1-14-Tab#1, CR. 145-146) On August 4, 1981, the Alabama Court of Criminal Appeals reversed Jones's conviction and remanded the case for a new trial. *Jones v. State*, 403 So. 2d 1 (Ala. Crim. App. 1981).

On December 10, 1982, a second jury found Jones guilty of the capital offense. (R1-14-Tab#11) The next day, the jury recommended a death sentence for Jones. (R1-14-Tab#21) On December 28, 1982, the trial court once again sentenced Jones to death. (R1-14-Tab#21) On

January 10, 1984, the Alabama Court of Criminal Appeals remanded the case with directions that the trial court extend its sentencing order to specify the mitigating circumstances it found to exist. *Id.* The Alabama Court of Criminal Appeals affirmed the case on return to remand on January 22, 1985. *Jones v. State*, 520 So. 2d 543 (Ala. Crim. App. 1984). On January 8, 1988, the Alabama Supreme Court affirmed Jones's conviction and death sentence. *Ex parte Jones*, 520 So. 2d 553 (Ala. 1988). This Court then denied Jones's petition for writ of certiorari. *Jones v. Alabama*, 488 U.S. 871 (1988).

Jones filed a petition for post-conviction relief under Rule 32 of the Alabama Rules of Criminal Procedure. (R1-14-Tab#36) An evidentiary hearing was held on November 13-14, 1995. (R1-14-Tab#34) On June 10, 1996, the trial court entered an extensive order denying the Rule 32 petition. (R1-14-Tab#39) The Alabama Court of Criminal Appeals affirmed the denial of the post-conviction petition, and the Supreme Court of Alabama denied Jones's petition for writ of certiorari. *Jones v. State* 753 So. 2d 1174 (Ala. Crim. App. 1999).

B. Proceedings in Federal District Court

Jones filed a petition for writ of habeas corpus on December 15, 2000. (R1-1) On March 22, 2001, the State of Alabama filed an answer to the habeas petition. (R1-11) On February 6, 2004, Judge Inge P. Johnson entered an order and memorandum opinion denying the habeas petition. (Pet. App., p. 37a) Jones filed a motion to alter or amend judgment on February 23, 2004. (R1-29) This motion was denied on April 6, 2004. (R1-30) On April 16, 2004, Jones filed a notice of appeal and a motion for a certificate of appealability. (R1-31; R1-32) Judge

Johnson entered an order granting the certificate of appealability on June 1, 2004. (R1-33)

The Eleventh Circuit affirmed the district court's denial of habeas relief on January 20, 2006. (Pet. App., at 1a) On March 23, 2006, the Eleventh Circuit denied Jones's petition for rehearing and petition for rehearing en banc.

C. Statement of the Facts

1. Facts of the Crime

On the morning of January 10, 1978, Jones, armed with a gun, went with Arthur Lee Giles to rob the Nelsons. Once inside the house, Jones stabbed three of the four victims; he delivered the fatal wounds to Carl and Willene Nelson. Worse, Jones delivered the fatal blows in the presence of the Nelsons' two children. He then also stabbed one of the children in the back. A more detailed statement of the facts can be found in the Alabama Court of Criminal Appeals' January 10, 1984 opinion. *Jones v. State*, 520 So. 2d at 545-546.

2. Facts from the State Post-Conviction Hearing

Jones was represented by Jack G. Davis and George M. Boles at the trial level. (R1-14-Tab#34, pp. 56-57) Mr. Davis, now deceased, was first appointed to represent Jones; Mr. Boles was appointed later because Mr. Davis did not have much criminal experience. (R1-14-Tab#34, p. 61) Even before Mr. Boles was appointed as lead counsel for Jones, he had a working knowledge of the case through Mr. Davis. (R1-14-Tab#34, p. 68) Although this case was Mr. Boles's first capital trial as defense counsel, he had worked for the District Attorney's office and had experience in criminal law. (R1-14-Tab#34, p. 56) Early

in the preparation of their case, Mr. Davis and Mr. Boles recognized that the weight of the evidence was against them and developed their trial strategy accordingly.

Mr. Boles had been practicing law since 1968, and had criminal law experience through his employment with the Madison County District Attorney's Office in Huntsville, Alabama. (R1-14-Tab#34, p. 56) Shortly before Jones's trial, Mr. Boles negotiated with the Blount County District Attorney for a plea agreement of life without parole. (R1-14-Tab#34, p. 58) Jones rejected the plea offer. (R1-14-Tab#34, p. 58)

Mr. Boles then began to prepare Jones's case. He conducted a type of "community survey" of the case to find out what the community remembered about the case, since it had originally been tried in 1979. (R1-14-Tab#34, p. 75) Afterward, Mr. Boles filed a motion for change of venue, which was denied by the trial court. (R1-14-Tab#34, p. 75) Mr. Boles also read and studied books on jury selection in order to adequately prepare for voir dire of the panel. (R1-14-Tab#34, p. 76) Although the evidence against Jones was overwhelming, Mr. Boles and Mr. Davis properly prepared a trial strategy in which he planned to put Jones's co-defendant, Arthur Giles, on the stand. (R1-14-Tab#34, p. 81) Mr. Boles's theory was that the jury would perceive Giles as another potential perpetrator of the crime who might be "saddled with guilt." (R1-14-Tab#34, p. 82) In essence, the jury would know that there was another perpetrator and would thereby be more comfortable in giving Jones life without parole. (R1-14-Tab#34, p. 82)

During trial, Mr. Boles had the opportunity to discredit one of the State's witnesses, Brenda Nelson. (R1-14-Tab#34, p. 86) Brenda Nelson, a child of the victims who had also been attacked, had made a prior inconsistent statement, which Mr. Boles attempted to

emphasize on cross-examination. (R1-14-Tab#34, p. 82) However, for tactical reasons, Mr. Boles decided not to dwell on the point with the witness. He testified at the Rule 32 hearing that, "[Y]ou have to recognize that with certain witnesses if you continue to berate them on cross-examination, you just enhance their credibility rather than destroy their credibility and the jury becomes sympathetic to them." (R1-14-Tab#34, pp. 86-87)

Mr. Boles recollected that there was some estrangement between Jones and some members of his family. (R1-14-Tab#34, p. 109) He recalled, based on what Mr. Davis had told him, that the family had been willing to help at the first trial, but by the time the second trial began, they were not friendly or helpful. (R1-14-Tab#34, p. 109)

Mr. Boles also considered presenting psychological evidence at trial, but opted to forego that evidence. Mr. Boles felt, based on his experience with the Madison County District Attorney's Office, that there would be some problems associated with presenting psychological evidence. (R1-14-Tab#34, p. 143)

Several other witnesses also testified at the Rule 32 hearing. Maritha Erby, Jones's mother, testified that she was not around during Jones's childhood, and that his father had been abusive. She also testified that Jones "was easy to be led." Mrs. Erby stated that no lawyer had ever contacted her, but that she would have testified had she been asked to do so. However, Mrs. Erby also testified that, while she was present at the 1979 trial, she did not attend the 1982 trial. Rather, she allowed her older brother to handle the matter of Jones's trial because she had small children at home. (R1-14-Tab#34, pp. 22-41)

Phyllis Erby Faevers, Jones's half-sister, testified similarly that Jones was always with a group and wanted to fit in. She stated that he was vulnerable to peer pressure. She also stated that no lawyer had contacted her, but if they had, she would have testified. (R1-14-Tab#34, pp. 49-54)

Glen Jones, Jones's sister, testified that Jones was a good brother to her and was good with her children. According to Ms. Jones, Jones resented his mother. She told of beatings that both she and Jones endured at the hands of various family members, including their father, aunts, and grandmother. Like the previous witnesses, Ms. Jones testified that Jones was a "follower," that he was needy, that he was easily influenced, and that he was weak. On the night of the murders, Glen Jones had several people in her home. According to the witness, the people, including Jones, were drinking, shooting drugs, using angel dust, marijuana, and other drugs. This went on while Ms. Jones's young children were in her home. Also like the other witnesses, Ms. Jones stated that she testified in the 1979 trial, and that she would have testified in 1982 had she been asked. Furthermore, any family member would have come to the 1982 trial had they been contacted. (R1-14-Tab#34, pp. 184-206)

Barbara Ann Jones, Jones's niece, testified that Jones had been a father figure to her and had helped her out of difficult situations. She also said that she never saw Jones under the influence of drugs or intoxicated. Likewise, Henry Erby, a half-brother of Jones, testified that Jones was kind, quiet, respectful, and had often given Mr. Erby advice. (R1-14-Tab#34, pp. 221-225, 278-280)

Jones's uncle, Johnny Wright, testified that Jones had lived with him at one time. At that time, he had adequate supervision and was good-natured. Mr. Wright stated

that Jones had good examples in his life, such as the choir at church. He followed people who were good examples. (R1-14-Tab#34, pp. 228-245)

Willie Woods, a friend of the family, saw Johnny Wright as a father-figure to Jones. Mr. Woods testified that Jones was just like a normal kid, and had good work habits. He is also opposed to the imposition of the death penalty. (R1-14-Tab#34, pp. 252-258)

Jones presented expert testimony from two doctors and a lawyer. The first medical doctor was a psychiatrist, Dr. Brad Fisher. Dr. Fisher testified as to Jones's various mental conditions, multi-substance abuse, and organic impairment. Despite the doctor's elaborate findings, Dr. Fisher testified that Jones was just as capable of following a good example in his life as he was following a bad example. He also testified that the behavior Jones exhibited toward his niece, in helping her through a crisis, was inconsistent with the personality of someone with Jones's diagnosis. Dr. Fisher testified that Jones was capable of acting independently, citing as an example the manner in which Jones obtained employment, as well as other instances of independent conduct. Dr. Fisher testified, albeit in a limited way, that Jones did have the ability to understand the proceedings. (R1-14-Tab#34, pp. 284, 293, 340-343, 350)[1]

Dan Turberville, an attorney, was presented to the court as an expert witness. Mr. Turberville listed a plethora of things that Mr. Boles did wrong, did not do, or

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[1] Dr. Brian Frist, a clinical pathologist, testified during the hearing on the Rule 32 petition as to the manner and cause of death of the two victims. (R1-14-Tab#34, p. 65A) His testimony is not pertinent to any of the grounds for relief raised in the certiorari petition.

should have done. However, despite the numerous errors which this witness found to have occurred, he nonetheless stated that, "It would be a very, very tough case to win given the fact situation ... Given the evidence in this case and the evidence that was put on, he didn't have a chance of winning." (R1-14-Tab#34, pp. 390, 19A, 52A)

Jones deposed three additional doctors after the Rule 32 hearing. The first doctor deposed was Dr. B. E. Blankenship, a psychiatrist who treated Jones from 1991 to 1995, while he was incarcerated at the Donaldson Correctional Facility. Dr. Blankenship stated that when he first treated Jones, Jones experienced auditory hallucinations, but that those symptoms had ceased due to medication. Notably, Dr. Blankenship explained his treatment records of Jones. Dr. Blankenship testified that, although the records read "psychosis" and "not otherwise specified," that was a "catchall diagnosis." He went on to state that while Jones has some odd behavior, odd thinking, and occasional hallucinations from time to time, his core personality is relatively intact. Dr. Blankenship also thought that perhaps Jones suffered weight loss while incarcerated due to mood depression. At one point, Jones claimed to have heard voices, but would not describe them or tell Dr. Blankenship what types of voices he was hearing. (R1-14-Tab#34, 1st Supp. pp. 16, 26-27, 43, 47)

Also deposed by Jones was Dr. Scott Alan Joesph, who first saw Jones in 1995. From Dr. Joseph's recollection and review of various notes, Jones most likely suffered from major depression with psychotic features. When Dr. Joesph examined Jones, however, he noted that Jones displayed no psychotic thought process or thought content. (R1-14-Tab#34, 1st Supp. pp. 376, 379, 387)

Finally, Jones deposed Dr. Richard Cooksey, a medical doctor who treated Jones from 1991 to 1994. Dr. Cooksey

treated Jones for probable malnutrition and possible tuberculosis. Dr. Cooksey believed that the possible malnutrition was not organically based. Rather, in his opinion, Jones was suffering from psychotic episodes because psychosis is a loss of contact with reality and/or impairment in day-to-day functioning. "If he is not eating, he's psychotic. That's pretty much normal day-to-day functioning, eating." (R1-14-Tab#34, 1st Supp. pp. 113-114, 120-121) Dr. Cooksey is a medical doctor, not trained in psychology or psychiatry.

REASONS FOR DENYING THE PETITION

It is worth noting at the outset that Jones has not alleged – let alone proven – any traditional ground for certiorari. He has not, for instance, argued that the Eleventh Circuit's decision below conflicts with the decisions of other courts of appeals, *see* Sup. Ct. R. 10(a), or that this case presents a novel and important question of federal law, *see* Sup. Ct. R. 10(c). At bottom, Jones request that this Court engage in a fact-bound review of his particular case. This Court should deny the petition.

I. This Court Should Decline To Review Jones's Splitless And Meritless Claim That The Eleventh Circuit Improperly Rejected His Ineffective Assistance Of Counsel Claim.

Jones asserts that the Eleventh Circuit decision – finding that the Alabama courts reasonably denied his ineffective assistance claim – conflicts with this Court's Sixth Amendment jurisprudence under 28 U.S.C. §2254(d). Certiorari should be denied on this claim for at least three reasons.

A. Certiorari Should Be Denied Because The Claim Raised In The Certiorari Petition Was Not Raised In Or Addressed By The Lower Court.

Jones did not argue in his rehearing brief to the Eleventh Circuit that its opinion was erroneous because: (1) it relied on mere speculation to excuse counsel's deficient performance; (2) its decision is in direct conflict with the professional standards for investigation and presentation of mitigating evidence; and (3) its analysis of the prejudice prong of the *Strickland* test is contrary to precedents of this Court. This Court will not consider questions that were not properly presented to or ruled on by the lower courts except in extraordinary circumstances. *See Parke v. Raley*, 506 U.S. 20 (1992); *Yee v. City of Escondido*, 503 U.S. 519 (1992). This case presents no reason to deviate from this rule. Certiorari should be denied for this reason alone.

B. Certiorari Should Be Denied Because The Underlying Issue Is Not Worthy Of Certiorari Review.

Jones's claim is simply a request for this Court to review the factual findings of the Eleventh Circuit Court of Appeals. Jones does not assert that there is a split in the circuits concerning his ineffective assistance of counsel claim or that this case presents a novel and important question of federal law. Instead, Jones is asking this Court simply for a review of the fact-bound determination of the Eleventh Circuit. As Supreme Court Rule 10 states, "[a] petition for a writ of certiorari [will] rarely [be] granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. Accordingly, this claim is not worthy of this Court's certiorari review.

C. Certiorari Should Be Denied Because This Claim Is Without Merit.

1. Jones first argues that the Eleventh Circuit relied on mere speculation to excuse counsel's deficient performance. Specifically, Jones asserts that George Boles never explained nor sought to justify his failure to investigate or present any mitigating evidence. Jones also contends that the State failed to elicit any testimony from Boles concerning his investigation of mitigating evidence. Jones then argues that the Eleventh Circuit manufactured excuses for counsel's deficient performance by speculating as to the existence of strategic decisions for which no evidentiary basis exists.

Jones's argument is completely without merit. Jones's entire argument concerning counsel's failure to investigate is that George Boles conducted no mitigation investigation and that, therefore, his representation was inadequate. Jones's argument is unpersuasive because Jones's current counsel completely ignores the fact that Jones was represented at trial by *both* George Boles *and* Jack Davis. (R1-14-Tab#34, p. 61) Jones also fails to acknowledge that Jack Davis was not available to testify during the Rule 32 proceedings because he was deceased.

In fact, it was Mr. Davis who had been retained to represent Jones during his 1979 trial. Boles (who shared office space with Davis) testified that, even before he became involved with the case, he had heard about it for what seemed "like an eternity." (R1-14-Tab#34, p. 68) "Jack's devotion to Aaron, I might add it was almost a religious campaign with Jack and his then wife. It seemed like that every five minutes it was something else about Aaron Jones' case, and I probably knew more about it then than I wanted to know." Just by being around Mr. Davis, Mr. Boles had a general impression about the case, "better than somebody just walking in off the street"

would have. (R1-14-Tab#34, p. 68) Because of the level of Mr. Davis's involvement in the case, and in the absence of any evidence to the contrary, the likelihood is that Davis did, in fact, learn much of the mitigation evidence, such as Jones's family history. In fact, Glen Jones, Jones's sister, was called to testify at the 1979 trial. In addition, Mr. Davis was retained by Jones's family to represent him during the 1979 trial. Thus, the reasonable inference is that Davis had investigated Jones's family background but decided not to present this evidence during the second trial.

The record also reflects that counsel investigated Jones's mental health prior to the 1979 trial and attempted a further investigation prior to the 1982 trial. The trial court made the following findings of fact concerning counsel's investigation of Jones's mental condition prior to trial:

> The record reflects that counsel for petitioner investigated and pursued a mental health defense for the first trial. Petitioner had been evaluated by the Lunacy Commission. Previous counsel [including Jack Davis], during the first trial, had filed appropriate motions for mental evaluations and had conducted depositions of the mental health experts who evaluated petitioner. The trial court subsequently denied the motion for private psychiatric examination and testing and funds for an expert witness in the field of mental health to perform intelligence and personality tests on the petitioner. (C.R. 204-205). Thereafter, petitioner was granted his right to refile his motion for

> psychiatric examination and said motion was granted. (C.R. 106).
>
> Subsequently, in preparation for the second trial, Jack Davis filed a motion for expert witnesses including mental health experts and filed a motion for private psychiatric examination and testing. (CR. 204-205). That was denied by the Court on December 7, 1982. (CR. 205). This Court finds that counsel in the 1982 trial filed the appropriate motions requesting mental health experts and the appropriate evaluations and tests to be performed upon petitioner and was denied relief by the Court.

(R1-14-Tab#39, pp. 12) Having been denied funds by the trial court, counsel were under no obligation to seek out experts and pay for their testimony from their own funds. This is especially true where counsel knew that Jones had previously been evaluated by the Lunacy Commission and the Lunacy Commission had found that he was not suffering from a mental illness when he committed the Nelson murders. (R1-14-Tab#1, vol. 1, p. CR-107)

Clearly, counsel had also investigated and were aware of Jones's drug and alcohol use on the night of the crimes because this evidence was presented to the jury during the guilt phase of the 1982 trial. There was testimony that Jones and Giles had been drinking and using drugs before the crime. Jones admitted in his confession that he was "so far gone" that he stabbed wildly.

The fact that Jack Davis was not available to testify during the Rule 32 proceedings concerning his pre-trial investigation into mitigation should not be held against the State. (R1-27, p. 35 n.5) As the district court stated,

> Insofar as Davis's death prevents proving what he did or did not do, the lack of evidence falls on the petitioner because he bears the burden of proving his allegations. The fact-finding courts will not presume, simply because Davis is unavailable to testify concerning whatever investigation he might have conducted, that his investigation was constitutionally inadequate. Petitioner makes much of the fact that co-counsel George Boles admitted that he conducted little or no investigation, but it must be remembered that Boles was appointed to represent petitioner in 1982 *only days before trial began.* Prior to that time, Davis had been representing petitioner since 1979. Thus, it is not surprising that Davis, not Boles, would have conducted the pretrial investigation of the case and that Boles was unable to describe it later at the Rule 32 hearing. (emphasis in original)

(R1-27, pp. 35-36 n.5) The record is replete with information about Jack Davis's devotion and preparation in this matter. Further, the record reveals that counsel investigated Jones's mental health, his drug and alcohol abuse, and his family background.

The Eleventh Circuit did not, as Jones asserts, rely on mere speculation when it found that counsel adequately conducted a mitigation investigation. Instead, the Eleventh Circuit properly reviewed the findings of the state post-conviction court and the Alabama Court of Criminal Appeals treatment of this claim. Because the

Eleventh Circuit properly rejected Jones's argument that his attorneys were ineffective because they failed to conduct a mitigation investigation, there is no reason for this Court to grant certiorari review.

2. Jones next asserts that the Eleventh Circuit decision is in direct conflict with the professional standards for investigation and presentation of mitigating evidence set out by *Strickland*, as illuminated by *Williams v. Taylor*, 529 U.S. 362 (2000), *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Rompilla v. Beard*, 125 S.Ct. 2456 (2005). This entire argument is also premised on Jones's argument that counsel failed to conduct a mitigation investigation. As set forth above, that argument is unpersuasive because the record reveals that counsel did conduct a mitigation investigation and Jones has completely failed to sustain his burden of proving otherwise.

In addition, contrary to Jones's argument, the Eleventh Circuit properly evaluated Jones's ineffective assistance of counsel claim as required by 28 U.S.C. §2254(d). Jones's claim was raised in the state post-conviction proceedings and in the Alabama Court of Criminal Appeals. In order to obtain relief on this claim in the Eleventh Circuit, Jones had to prove that the decision of the Alabama Court of Criminal Appeals is contrary to or involves an unreasonable application of federal law as determined by this Court, or that the decision is based on an unreasonable determination of the facts that were presented during the state court proceedings. 28 U.S.C. §2254(d)(1) and (2). A review of the Eleventh Circuit opinion reveals that it conducted the proper analysis under §2254(d)(1) and (2). *Jones v. Campbell*, 436 F. 3d 1285, 1293-1300 (11th Cir. 2006). Furthermore, *Williams*, *Wiggins*, and *Rompilla* do not

require relief because there is no evidence that counsel incorrectly thought that state law barred access to certain records, *see Williams*, at 395, that counsel had reports indicating possible mitigating evidence existed, *see Wiggins*, at 518, or that counsel failed to examine police files that would have lead to the discovery of mitigating evidence, *see Rompilla*, at 2467. In fact, the Alabama Court of Criminal Appeals stated the following concerning counsel's alleged failure to investigate: "We note that there is nothing in the record to suggest that Jones's trial counsel ignored matters that should reasonably have alerted them to Jones's mental health or to the value of contacting persons who might have information about Jones's background that might aid in his defense." *Jones v. State*, 753 So. 2d 1174, 1197 (Ala. Crim. App. 1999). *Williams*, *Wiggins*, and *Rompilla*, therefore, do not require reversal of this case, and the Eleventh Circuit did not err when it affirmed the denial of habeas relief without expressly discussing those cases. Contrary to Jones's argument, the Eleventh Circuit decision is not in direct conflict with the professional standards for investigation and presentation of mitigating evidence.[2]

II. This Court Should Decline To Review Jones's Splitless And Meritless Claim That Counsel's Failure To Investigate And Present Mitigating Evidence At Sentencing Constitutes Ineffective Assistance.

Jones asserts that trial counsel failed to investigate and present the following substantial mitigating evidence: evidence of mental illness and impairment; evidence of an

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[2] The State will address Jones's prejudice argument under Issue II of this brief.

abused and deprived childhood; and substance abuse and intoxication on the night of the crime. Jones also contends that counsel's failure to present this evidence prejudiced him at sentencing. Certiorari should be denied on this claim for at least two reasons.

A. Certiorari Should Be Denied Because The Underlying Issue Is Not Worthy Of Certiorari Review.

Jones's claim is simply a request for this Court to review the fact-bound determination of the Eleventh Circuit. Jones does not assert that there is a split in the circuits concerning his ineffective assistance of counsel claim or that this case presents a novel and important question of federal law. Instead, Jones is asking this Court for nothing more than a review of the factual determination of the Eleventh Circuit. *See* Sup. Ct. R. 10. Accordingly, this claim is not worthy of this Court's certiorari review.

B. Certiorari Should Be Denied Because The Claim Is Without Merit.

Jones's claim that trial counsel failed to investigate and present mitigating evidence was raised in the state post-conviction proceedings and were rejected by both the Rule 32 court and the Alabama Court of Criminal Appeals. *Jones v. State*, 753 So. 2d 1174, 1191-1199 (Ala. Crim. App. 1999). To obtain relief on these claims, Jones must show that the Alabama Court of Criminal Appeals' decision is contrary to or involves an unreasonable application of federal law as determined by the Supreme Court, or that the decision is based on an unreasonable determination of the facts that were presented during the state court proceedings. 28 U.S.C. §2254 (d)(1) and (2). In determining that Jones failed to carry his burden of

proving ineffective assistance of counsel, the state court made factual findings, which are presumed correct unless rebutted by clear and convincing evidence. 28 U.S.C. §2254(e). The state court's credibility determinations are factual findings that are presumed correct. *Bottoson v. Moore,* 234 F.2d 526, 534 (11th Cir. 2000). As set forth below, Jones has failed to carry his burden of proof.

1. Failure To Present Evidence Of Mental Illness And Impariment.

Jones first contends that the Eleventh Circuit unreasonably found that the Lunacy Commission Report indicated that he did not suffer from a mental illness and that much of the evidentiary basis for his claim arose after his trial, during his imprisonment. (Pet. at 18-19) Contrary to Jones's assertion, the Eleventh Circuit's findings are clearly supported by the record. The Lunacy Commission conducted tests on Jones on April 6, 1979. Although the tests indicated a suggestion of organic impairment, Jones's test results indicated only "minor" distortions. The Lunacy Commission acquired this information after conducting skull x-rays and an electroencephalogram (EEG) on Jones. Neither test showed any abnormalities. Even after having acquired the information regarding potential organic impairments, the Lunacy Commission nonetheless formed the opinion that Jones did not suffer from any mental illness that would affect his ability to know right from wrong or to act in the right way. The Eleventh Circuit, therefore, properly found that the Lunacy Commission Report indicated that Jones did not suffer from a mental illness.

Likewise, the Eleventh Circuit also properly found that much of the evidentiary basis for Jones's claim arose after his trial. Most of the testimony relied on by Jones to prove that he is psychotic was generated after he was incarcerated for this capital offense. In fact, the

testimony of both experts presented during the state post-conviction evidentiary hearing was based in large part on the diagnoses of psychosis made after Jones was incarcerated. The Eleventh Circuit, therefore, properly stated that "much of the evidentiary basis for petitioner's current claim of mental illness arose *after* his trial, during his imprisonment." *Jones v. Campbell*, 436 F. 3d 1285, 1296. (emphasis in original) (Pet. App. at 18a)

Jones next alleges that the Eleventh Circuit merely speculated, without any evidentiary support, that Boles and Davis apparently concluded not to present any psychological or psychiatric testimony at sentencing. The Eleventh Circuit stated the following in its opinion:

> The information counsel had before them at the 1982 trial was the 1979 Lunacy Commission Report which indicated that Jones did not suffer from a mental illness. Furthermore, Boles testified at Jones's Rule 32 hearing that Jones did not have any problems communicating with him and Davis during trial. *Id.* at 167. Boles stated that he and Davis talked to Jones extensively about the sentencing, and they apparently concluded not to present any psychological or psychiatric testimony at sentencing. *Id.* at 105, 146. Boles emphasized that he relied heavily upon Davis's knowledge of the case because Davis represented Jones at his 1979 trial. *Id.* at 68. (footnote omitted)

Jones, 436 F. 3d at 1296. The Eleventh Circuit's conclusion, based on Boles testimony, was correct.

Jones's next argument (that Boles relied heavily upon Davis's knowledge of the case because Davis represented

Jones at his 1979 trial) is based once again on the fact that there is no evidence that Davis performed any investigation in 1979 or 1982. He then argues that the fact that Davis participated in his 1979 trial should have no impact on his ineffective assistance of counsel claim. As set forth above and as the district court found, the fact that Davis was not available to testify during the state post-conviction proceedings cannot be held against the State. In addition, the record clearly reveals that a mitigation investigation was conducted in this case. Jones's claim that the Eleventh Circuit improperly found that Boles "relied heavily upon Davis's knowledge of the case because Davis represented Jones at his 1979 trial" was a reasonable interpretation of the facts in this case.

Jones also takes issue with the Rule 32 court's finding that "there has been no reasonable dependable diagnosis of psychosis." The Alabama courts correctly determined that the evidence presented by Jones in support of his claim did not credibly prove significant mental problems and was not adequate evidence of a statutory or non-statutory mitigating circumstance. *Jones v. State*, 753 So. 2d at 1191-1195. As the district court noted, "[m]uch of the evidentiary basis for petitioner's current claim of mental illness arose *after* his trial, during his imprisonment. Certainly, it was not objectively unreasonable for the state courts to discount this evidence that did not exist at the time the trial occurred." (R1-27, p. 49) (emphasis in original) (Pet. App. at 89a) Further, the Alabama courts properly found that the heavy reliance by Dr. Fisher and Dr. Davis on the prison staff's evaluation was misplaced. *Jones*, 753 So. 2d at 1192-1193. One of these doctors, Dr. Cooksey, was not a psychiatrist or psychologist. He based his opinion that Jones was psychotic purely on the fact that Jones lost a great deal of weight, for which there was no apparent medical basis. (R1-14-Tab#34, 1st Supp. pp. 120-122, 124)

Dr. Joseph's finding that Jones was psychotic was based on a notation that Jones had a history of "apparently not being completely in touch with reality at one point. That was the reason he was on the medications." Although Dr. Blankenship had noted that Jones was psychotic, he testified that Jones most likely had a schizotypal personality disorder, where a person has some odd behavior or odd thinking, and may have hallucinations from time to time, but his core personality organization is relatively intact. (R1-14-Tab#34, 1st Supp. pp. 21, 27) As the Alabama courts noted, neither Dr. Joseph nor Dr. Blankenship had performed any individualized testing or evaluations of Jones.

The Alabama courts correctly concluded that there was no reasonably dependable diagnosis of psychosis to support Dr. Fisher's opinion. Dr. Fisher's own testimony supports that finding. Dr. Fisher testified that Jones's actions in helping his niece through a difficult time were inconsistent with someone with Jones's diagnosis of psychosis. (R1-14-Tab#34, p. 342) Also, Jones is capable of independent actions, such as obtaining employment, and other instances of which the doctor was not aware. (R1-14-Tab#34, p. 343) Thus, the Alabama courts correctly weighed and discredited all aspects of Dr. Fisher's testimony.

Jones also relies on an affidavit of Dr. Dave Davis. Dr. Davis was not subject to cross-examination concerning his opinion, and thus his findings should be given little weight. Nonetheless, it appears that Dr. Davis was also misguided. He also relied heavily on the "diagnosis" of Dr. Cooksey, and incorrectly referred to him as a "prison psychiatrist." (R1-14-Tab#34, 1st Supp. p. 612)

Finally, Jones argues that the Rule 32 court's finding that Dr. Fisher's diagnosis of low intelligence is rebutted by the testimony of family members who stated that he

did well in school is objectively unreasonable. Certainly, evidence that Jones did well in school is relevant to a determination of his overall intelligence. An IQ test found in the Bryce records indicated that Jones IQ was 84, which is in the low/average range. Additionally, the Lunacy Commission stated that the IQ findings were considered an "adequate, but not optimal" estimate of his true ability level. The Lunacy Commission speculated that perhaps the score was even lower than it would be in reality because of the "residual effects of his alcohol and multiple substance abuse rather than a primary perceptual motor deficit." Based on the above, the Rule 32 court's determination that Dr. Fisher's diagnosis of low intelligence is rebutted by the testimony of family members who stated that he did well in school is not objectively unreasonable.

2. Failure To Present Evidence Of Abusive And Deprived Childhood.

Jones asserts that the Eleventh Circuit's finding that the evidence of physical abuse was "negligible" was clearly an "unreasonable determination of the facts in light of the evidence presented in the State court proceedings. 28 U.S.C. §2254 (d)(2)." Jones argues, relying on *Wiggins v. Smith*, 539 U.S. 510 (2003), *Williams v. Taylor (Terry)*, 529 U.S. 362 (2000), and *Rompilla v. Beard*, 126 S.Ct. 2456 (2005), that the history of abuse suffered by him is precisely "'the kind of troubled history, we have declared relevant to assessing a defendant's moral culpability.'" Jones's arguments are without merit.

The Rule 32 court found as follows concerning the alleged abuse suffered by Jones and his sister:

> Petitioner's sister, Glen Jones, testified to abuse by their father. She testified that her father was rarely around but when he did

> come that he would make petitioner and Glen take off their clothes, would tie them to a door knob and beat them with a cord. She testified that the beatings with a cord were so severe that wire from the extension cord was embedded in their flesh. The Court concludes that this is an exaggeration and that had this abuse occurred there would be some obvious scarring from where such young children were beaten to the point where the insulation of an extension cord was torn off and wire was embedded in their skin. The other evidence of abuse is negligible.
>
> The opinion of Dr. Fisher as to the effects upon petitioner of this "abusive childhood" is rebutted by other family members that testified, including Glen Jones. Their testimony suggests that, although petitioner had to live with relatives and was beaten by his father and had other problems with family members, he adjusted well. Petitioner made good grades in school and had no trouble with teachers. He was helpful to people and was polite and well behaved. He was able to maintain employment and although he had a few problems with attendance, was generally considered to be a good worker. Petitioner attended church and played in the school band. He was not a violent person growing up.

(R1-14-Tab#39, pp. 15-16) Jones has failed to show that the state court's findings concerning this claim were an unreasonable determination of the facts in the light of the

evidence presented during the tate post-conviction proceedings. 28 U.S.C. §2254 (d)(2). The Alabama courts correctly determined that the testimony offered by Jones's family members and friend during the State post-conviction proceedings did not establish a mitigating circumstance and would not have changed the balance of aggravating and mitigating circumstances. *Jones*, 753 So. 2d at 1196-1197. Counsel was, therefore, not ineffective in this regard.

Jones mischaracterizes the trial court's holding concerning the physical abuse suffered by Jones at his father's hands. The trial court did find that the sister's testimony about the abuse suffered by Jones was an exaggeration but did not find, as Jones implies, that the testimony was negligible. Instead, the trial court found that the other evidence of abuse was negligible. Indeed, the trial court was correct in finding that the sister's testimony was an exaggeration of the abuse suffered by Jones and his sister. Glen Jones testified that her father was not around very much but he came around occasionally. (R1-14-Tab#34, p. 186) She also testified that, when her father did come around, he would ask their grandmother if they had been bad. If their grandmother reported that they had been bad, their father would beat them with an extension cord. (R1-14-Tab#34, pp. 186-187) Glen Jones later testified that these beatings happened frequently, even though she had just testified that her father was not around very much. (R1-14-Tab#34, p. 188) Because Glen Jones's testimony was contradictory, the trial court properly found that her testimony of abuse was an exaggeration. For the same reasons, the Eleventh Circuit also properly found that her testimony was "contradictory and potentially more harmful than helpful." (Pet. App. at 23a)

Jones's reliance on *Wiggins*, *Williams*, and *Rompilla*, to argue that trial counsel was ineffective for failing to present the evidence of abuse as a mitigating circumstance is also misplaced. In *Wiggins*, *Williams*, and *Rompilla*, the mitigating evidence which trial counsel failed to present was substantial. This Court in *Wiggins* described the mitigating evidence that counsel failed to present as "powerful" and included "severe privation and abuse in the first six years of his life while in the custody of his alcoholic, absentee mother." He also "suffered physical torment, sexual molestation, and repeated rape during his subsequent years in foster case." *Wiggins*, 539 U.S. at 535. This Court described the mitigating evidence which trial counsel failed to present in *Williams* as "extensive," including the fact that "Williams' parents had been imprisoned for the criminal neglect of Williams and his siblings, that Williams had been severely and repeatedly beaten by his father, that he had been committed to the custody of the social services bureau for two years during his parents' incarceration (including one stint in an abusive foster home), and then, after his parents were released from prison, had been returned to his parents' custody." *Williams*, 529 U.S. at 395. In *Williams*, the omitted evidence was so convincing that the trial judge who presided over Williams's trial and sentenced Williams to death concluded that there was a reasonable probability that the result of the proceeding would have been different if the jury had heard the evidence. *Id.* In *Rompilla*, the mitigating evidence was also substantial. Rompilla's parents were severe alcoholics, his mother drank during her pregnancy with him, his father beat both his mother and Rompilla. In fact, his father beat Rompilla when he was young with his hands, fists, leather straps, belts, and sticks. All of the children lived in terror and there were no expressions of parental love, affection, or approval. *Rompilla*, 126 S. Ct.

at 2468. On one occasion, Rompilla's father locked Rompilla and his brother in a small wire mesh dog pen that was filthy and excrement filled. *Id.* In addition, Rompilla and his family had no indoor plumbing, he slept in the attic with no heat, and the children were not given clothes and attended school in rags. *Id.* at 2469.

The abuse in this case was not nearly as substantial as the abuse suffered by the defendants in *Wiggins, Williams,* and *Rompilla.* Jones was occasionally beaten by his father. This abuse ended when his father died when Jones was 8 years old. (R1-14-Tab#34, p. 195) Shortly after his father died, Jones went to live with his maternal grandmother where he was loved and not abused. This is not a case where Jones was continually abused by one or both of his parents and then placed in a situation where he received even more abuse. The Alabama courts correctly determined that, had this evidence been presented to a jury, it would not have been mitigating.

3. Failure To Present Evidence Of Substance Abuse And Intoxication.

Jones asserts that his attorneys were ineffective because they failed to present evidence that he was suffering from a toxic psychosis on the night of the murders. This claim is not worthy of this Court's certiorari review.

The district court properly found that counsel was not ineffective for failing to present evidence of his intoxication. As the district court noted:

> Evidence of petitioner's drug use was presented to the jury during the guilt phase of the 1982 trial. There was testimony that Giles and petitioner had been drinking and

> using drugs prior to the crime. Witnesses testified that they appeared drunk and petitioner admitted in his confession that he was "so far gone" that he stabbed wildly. This Court did not lead to a better outcome for petitioner, and there is no reason to believe the jury failed to consider it for whatever mitigating power it had during the sentencing phase.

(Pet. App. at 82a) As the district court further noted: "The courts have noted that evidence of drug and alcohol abuse 'often has little mitigating value and can do as much or more harm than good in the eyes of the jury.' *Crawford v. Head*, 311 F.3d 1288, 1321 (11th Cir. 2002); *see also Haliburton v. Secretary for the Dep't of Corr.*, 342 F.3d 1233 (11th Cir. 2003)." (Pet. App. at 82a) The Eleventh Circuit then stated the following concerning this claim:

> Because Jones did not raise this specific claim of ineffective assistance of counsel in state court, the claim is procedurally barred. *See Johnston v. Singletary*, 162 F.3d 630, 634-35 (11th . Cir.1998). Assuming *arguendo* that Jones raised in state court the specific claim that counsel were ineffective for failing to present evidence of his toxic psychosis in mitigation, the claim lacks merit. The only evidence Jones proffers to support his claim is the affidavit of Dr. Davis. Dr. Davis opined that Jones was suffering from toxic psychosis on the night of the murders; however, Dr. Davis's affidavit was submitted after the Rule 32 hearing, and

> the State had no opportunity to cross-examine him. Because Jones fails to present any credible evidence to support his claim of toxic psychosis, he cannot show that his counsel were ineffective for failing to present this alleged evidence in mitigation.

Jones, 436 F. 3d at 1299. (Pet. App. at 24a) Jones has not attempted to show that the holdings of the district court or the Eleventh Circuit concerning counsel's failure to present evidence of his alleged toxic psychosis is wrong. This Court should, therefore, refuse to grant certiorari on this allegation.

4. Prejudice

Jones asserts that mitigating evidence showing his mental illness, his physical abuse as a child, and his extreme intoxication would have compelled the jury to recommend a sentence less than death. Jones also argues that the Eleventh Circuit failed to consider the sum of the available mitigating evidence when assessing prejudice. Jones's argument is without merit.

Jones's argument that the Eleventh Circuit did not consider the sum of the available mitigating evidence is without merit. While the Eleventh Circuit did examine each alleged failure to present mitigating evidence, it then considered the totality of the evidence. *Jones*, 436 F. 3d at 1300. (Pet. App. at 25a) The Eleventh Circuit also properly rejected Jones's claim that the totality of the mitigating evidence would have compelled the jury to recommend a sentence of life without parole. Given the heinousness of this crime, and the overwhelming evidence of Jones's guilt, there simply is no "reasonable

probability" that counsel's failure to present evidence of Jones's mental health problems, his abusive childhood, or his intoxication would have prejudiced Jones. Jones, armed with a gun, went with Giles to rob the Nelsons. Once inside the house, Jones stabbed three of the four victims, including the fatal wounds to Carl and Willene Nelson. Worse, Jones delivered the fatal blows to the Nelsons in the presence of their two young children. He then stabbed one of the children in the back. *Jones*, 520 So. 2d at 545-546.

The failure of Jones's counsel to present the weak evidence offered during the state post-conviction proceedings did not prejudice Jones. The Eleventh Circuit's determination that Jones failed to prove prejudice is correct. This Court should, therefore, refuse to grant certiorari to consider the Eleventh Circuit's determination that Jones failed to establish prejudice.

CONCLUSION

For the foregoing reasons, this Court should deny Jones's petition for writ of certiorari.

Respectfully submitted,

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